

No. 2719

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

---

SANTA CRUZ DEVELOPMENT  
COMPANY,

*Appellant,*

Against

CORNELIUS C. WATTS et al.,

*Appellees.*

---

SUPPLEMENTAL BRIEF IN BEHALF OF  
SANTA CRUZ DEVELOPMENT COMPANY, APPELLANT.

---

G. H. BREVILLIER,

*Counsel for Santa Cruz Development Company.*

**Filed**

FEB 16 1916

[F. D. Menckton,  
Clerk.]



No. 2719

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

SANTA CRUZ DEVELOPMENT  
COMPANY,

*Appellant,*

Against

CORNELIUS C. WATTS et al.,

*Appellees.*

---

## SUPPLEMENTAL BRIEF IN BEHALF OF SANTA CRUZ DEVELOPMENT COMPANY, APPELLANT.

---

The purpose of this brief is to furnish the Court with references to decisions bearing upon the claims of Joseph E. Wise and Lucia J. Wise to a prescriptive title to certain small parts of the tract at bar; and also to answer the Bouldin brief which we did not receive until late in the afternoon of February 5, 1916.

No adverse possession by defendants Wise.

For nearly ten years last past, Mr. Wise has claimed an undivided interest in the whole tract as a tenant in common. Consequently his actual

possession could not be adverse. During that time, his wife, Lucia J. Wise, has lived with him upon part of the land to which a prescriptive title is claimed. Certainly her possession cannot be considered as adverse to her husband who claimed to be a tenant in common.

**When limitation starts.**

On pages 1 to 7 and on page 13 of our Reply Brief, we discussed the function of the survey and the necessity of it to the grant owners in order that they might take possession of the tract at bar and maintain ejectment against trespassers. Now we need only point out when the survey became official and actually segregated the tract from the public domain.

Since the modification of the Land Department rules in 1879, no survey is complete until the Commissioner of the General Land Office accepts it and orders it filed.

*Maguire v. Tyler*, 1 Black 195, 201, 202

*Knight v. Land Ass'n*, 142 U. S. 161, 179

*Tubbs v. Wilhoit*, 138 U. S. 134, 144

*Clearwater Timber Co. v. Shoshone County*,  
155 Fed. 612, 631

This is true even where a special statute empowers the Surveyor General to make and approve the survey.

*Castro v. Hendricks*, 23 How. 438, 442, 443

The Commissioner's approval can be shown by his direction that the survey be filed.

*Tubbs v. Wilhoit*, 138 U. S. 134, 144, 145

In the case at bar, the Commissioner on December 14, 1914, filed the plat of survey and thereby approved it; he also transmitted a duplicate plat to the local land offices for filing therein. Consequently no limitation statute for a possessory title could commence to run until that date.

**Reply to Bouldin brief.**

At the middle of page 42 of that brief, the statement is made that the commencement of the Bouldin paper with the words "This Indenture" denominates it as a conveyance. If any answer be needed, the attention of the Court is called to the following cases wherein the instrument began with the same words, but the instrument nevertheless was held to be an executory contract.

*Dunnaway v. Day*, 63 S. W. 731; 163 Mo. 415

*Mineral Dev. Co. v. James*, 34 S. E. 37; 97 Va. 403

*Dreisbach v. Serfass*, 17 Atl. 513; 126 Pa. 32

Then there follows in the Bouldin brief a statement that the expression in the Bouldin paper, "in further consideration of this conveyance", indicates that a conveyance was intended. Of course there are absolute conveyances and conditional conveyances, present conveyances and future conveyances. The best

answer, however, to the Bouldin contention is to refer the Court to cases where similar or even stronger expressions were used, and the instrument nevertheless held to be an executory contract on its face.

*Hazlett v. Harwood*, 16 S. W. 310; 80 Tex. 510

*Taylor v. Taul*, 32 S. W. 866; 88 Tex. 665

The Court will note that the Bouldin paper was executed in El Paso or Santa Fe (probably in the former place because of the subsequent proof there by a subscribing witness); and that a large percentage of the cases, wherein instruments containing the phraseology of a present conveyance have been held to be executory contracts, were decided by the courts of Texas or other southwestern states, and by the United States Supreme Court in affirming appeals from New Mexico and Arizona.

Respectfully submitted,

G. H. BREVILLIER,

*Counsel for Santa Cruz Development Company.*

(Copies of this brief are being mailed to all the attorneys in the case.)